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CHARLES ELMO

Supreme Court of the United States

October Term, 1929.

No. 47.

HENRY FORD & SON, INC.,

Petitioners,

vs.

LITTLE FALLS FIBRE COMPANY, ASBESTOS SPINNING AND WEAVING CORPORATION and HARRY A. FURMAN, CHARLES H. BURROWS and CLARENCE T. WRIGHT, as Receivers of Mohawk Paper Makers, Inc.,

Respondents.

BRIEF FOR RESPONDENTS.

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THE ARGUS COMPANY, ALBANY, N. Y.

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Respondents.

BRIEF FOR RESPONDENTS.

Petitioner's brief is written about an imaginary case which is not presented by the record on this appeal. We believe that when the actual facts are considered, there is no serious question of law presented.

STATEMENT OF THE CASE

Respondents properties are located in the Town of Waterford, Saratoga County, State of New York on the northernmost branch or sprout of the Mohawk river about a half mile westerly of its confluence with the Hudson.

Their manufacturing plants are operated by water power obtained from the river by means of what is known as the Kings Canal development which was made in or about the year 1828, over a century ago. It consists of a dam extending across that branch of the Mohawk by means of which water is diverted into a power canal running along the north bank of the river. The

mills are located between the canal and the river and the water is drawn from the canal through the respondent's water wheels and is then discharged into the river beneath the mills. The mills are located in part in the river itself.

The Trial Court found as a fact (R. 21, Finding 19th), that at the location of respondent's property, and for some distance westerly, the river is incapable of navigation by reason of falls and rapids.

The petitioner has stipulated (R. 232) and conceded that the respondents are *the owners of the dam and water power* and that the respondents and their predecessors in title have been in ownership, possession and enjoyment thereof for a century.

The power is essential to the operation of the mills and they are substantial industries, representing large investments.

In 1823 the State constructed across the Hudson river at Troy, a dam with a crest elevation of 13.2 feet above sea level Barge Canal Datum (hereafter abbreviated to B. C. D.). This dam was located about three miles downstream from the respondents' plants. It had a lock in its easterly end for the passage of boats.

In 1915 the Federal government constructed a new dam and lock at Troy to replace the old State dam, locating it about 1,000 feet upstream above the site of the latter dam. This dam also has a lock in its easterly end.

The new dam was erected in two sections, the one extending from the easterly bank at right angles thereto and the other section continuing diagonally downstream until it reaches the westerly bank of the river. The easterly section was built to a crest elevation of 15.2 B. C. D. (2 feet higher than the old State dam) and the westerly section to a crest elevation of 17.2 B. C. D. (4 feet higher than the old State dam).

During the ten-year period from 1915 to 1925 no flashboards were used on the Troy dam though throughout this period the lock and the pool formed by the dam were in continuous use for navigation purposes during the navigation seasons (R. 152).

In 1921 the petitioner procured a license (R. 235 et seq.) from the Federal Power Commission, under the Federal Water Power Act of 1920, for the construction of an hydro-electric power plant at the westerly end of this Troy dam and, since the powerhouse was completed in April, 1923, the petitioner has been operating this powerhouse, drawing its water from the pool formed by that dam.

The petitioner obtains 8,480 horsepower (R. 230) for which it pays to the Government the nominal rental of $5,000 a year.

The petitioner is not a public service corporation but is a private corporation, a subsidiary of the Ford Motor Company, and all the power developed in this power station is transmitted to and utilized by, the Ford Motor Company in its plant at Green Island, N. Y., for private manufacturing purposes (R.115-6).

It is probable that the pool formed by the old State dam did not reach as far as the respondents' plants, but there is no question that the pool of the new Federal dam did reach to the respondents' tail races so that we have one pool of water extending from the dam up to respondents' plants. Any increase in the elevation of the water at the Troy dam results in a corresponding increase at the respondents' plants.

On June 16th, 1925, the petitioner attached two feet of flashboards to the eaterly section of the Federal dam, thereby raising the crest of that section from 15.2 B. C. D. to 17.2 B. C. D. The immediate result was, of course, to back two feet of water on the respondents' plants. The official records of the water elevations for that week show the results clearly:

Day	Water Elevation
June 13, 1925	16.2 B. C. D.
" 14, "	16.4
" 15, "	15.3
" 16, "	15.8
" 17, "	18.2
" 18, "	18.1

The water on June 13th and 14th was at its normal elevation; on the 15th and 16th the water was drawn down so that the men could go out on the dam to attach the flashboards; and on the 17th and 18th the flashboards were in operation.

The maximum gross head available to the respondents is only 14.4 feet. Thus the loss of two feet of head is a very serious and substantial loss.

The extent of the damage is evident from the fact that the petitioner has stipulated the damages of two of the respondents to be $5,210 for a period of *only four months* from June to October, 1925.

Moreover, if the petitioner is successful in this case, respondents cannot prevent it from getting permission to install four or even six feet of flashboards and thereby substantially to destroy respondents' water power and double its own water power with the head thus stolen from respondents.

It should be noted that the water is backed upon the buildings of respondents as well as into their tailraces. (Decision, R. 20-21.)

The findings of the Trial Court that these flashboards deprived the respondents of a portion of their water power are ample. (R. 19-21.)

As a result of the placing these flashboards on the dam, the petitioner has not only reduced the power available to the respondents, but it has taken that same power to itself. What it actually did was to steal two feet of head from the respondents at Waterford and convert the same head to its own use at Troy. By this means it increased very substantially the power of its own plant as its manager admits. (R. 115-6.)

This procedure was grossly dishonest and unconscionable. It was a theft of water power by the petitioner from the respondents. And the petitioner now has the effrontery to argue (Petitioner's brief, 35, et seq.) that "there has been no taking."

The law is not so sadly deficient that it offers no remedy to respondents for conduct which, in principle, is the same as if the petitioner had placed its hand in our pockets and abstracted therefrom money which it controverted to its own use.

Point I

Respondents' ownership of the water power and dam is stipulated and respondents are entitled to protection therefor.

(a) Respondents' ownership of the water power, the dam, and the riparian rights is stipulated and conceded.

One of the most important features of this case is that the petitioner has stipulated that the respondents *own the water power* at the site of their development and that they and their predecessors in title have owned and possessed this water power for a century.

The stipulation between the parties (Plffs'. Ex. 1) reads in part as follows (R. 232):

> "11. The dam and hydraulic canal of the plaintiffs referred to in the complaint and known as King's dam and King's canal were constructed in or about the year 1828 by the predecessors in title of the plaintiffs.
>
> 12. Said dam and canal and the land adjoining same upon which are located the mills of the plaintiffs, together with water power made available by said dam and canal, have been owned, possessed, used, occupied, operated and maintained by the plaintiffs and their precedessors in title continuously since in or about the year 1828."

The Court made findings in the same terms (R. 18 and also R. 23) and no exception has been taken by petitioner to those findings. (R. 32.)

In discussing a water power on the Hudson river our Court of Appeals said:

> "The rule of law is familiar that each owner of land contiguous to a natural watercourse has a right, as owner of such land and as naturally connected with and incident to it, *to the natural flow of the stream along his land and its descent, and all the force to be derived therefrom,* for any domestic or hydraulic purpose to which he may decide to apply it. * * * *Those are raparian rights, are natural and inherent, and a part of the estate of each riparian owner."*
>
> * * * * *
>
> "The right to the use of the water of a flowing stream, navigable or unnavigable, arises by mere operation of law as incident to the ownership of *the bank* and *is a part of the estate of its owner.* (Citing cases.) *It is a valuable property right* which can be severed from the riparian land by grant, condemnation, relinquishment or prescription."
>
> *United P. B. Co. v. Iroquois P. & P. Co.,* 226 N. Y., pp. 44-47.

This "valuable property right" the petitioner proposes to take from respondents without compensation for its own private manufacturing purposes.

(b) Under the law of New York the respondents have the right to have the water leave their property at its natural level free from the effect of downstream obstructions.

"Aqua currit et debet currere ut currere solebat." (Pixley v. Clark, 35 N. Y., 520 at page 524.)

The absolute right to have the waters continue to flow in their natural condition has been established beyond any question.

Hall v. Augsbury, 46 N. Y., 622 at 625-6.
Brown v. Bowen, 30 N. Y., 519 at 537-9.
Rothery v. N. Y. Rubber Co., 24 Hun, 172; 90 N. Y., 30.
American Woolen Co. v. State, 195 App. Div. 698 at page 704.
United P. B. Co. v. Iroquois P. P. Co. 226 N. Y. 38.
Gardner v. Village of Newburgh, 2 Johns. Ch. 162 at 164.

"Here the defendants, and those under whom they claim, had no right to raise the water by flashboards, or otherwise, on the plaintiff's premises, higher than it naturally ran, even though such increased height did not back water upon plaintiff's mill wheels, so as materially to obstruct their action.

The plaintiffs had a right to have the water run as it had been accustomed to run, in height and in speed, through their land."

Hall v. Augsbury, supra.

"The maximum *sic utere tuo, etc.,* applies as well to setting back the water of a watercourse above the owner's land in the natural channel of the stream, as it does to an actual overflow of land. * * * No single proprietor without consent, has a right to make use of the flow in such manner as will be to the prejudice of any other, and that he has no more power to apply it to a purpose which occasions a return of the water on the land above, than he has to cause a diminution of the quantity below. He *cannot alter the level of the water either where it enters or where it leaves his property.*"

Brown v. Bowen, supra.

In *United States v. Cress,* 243 U. S., 316, this Court, citing New York authorities, said (page 321):

> "By an unbroken current of authorities it has become well established that the test of navigability in fact is to be applied to the stream in its natural condition, not as artificially raised by dams or similar structures; that the public right is to be measured by the capacity of the stream for valuable public use in its natural condition; that *riparian owners have a right to the enjoyment of the natural flow without burden or hindrance imposed by artificial means,* and no public easement beyond the natural one can arise without grant or dedication save by condemnation with appropriate compensation for the private right."

(c) Under the law of New York the backing of water upon the water power or lands or buildings of respondents is an invasion of real property rights and constitutes a continuing trespass against which the injured party is entitled to injunctive relief.

Corning v. Troy Iron & Nail Factory, 40 N. Y., 191.
Rothery v. N. Y. Rubber Co., 90 N. Y., 30.
Neveigh v. International Paper Co., 125 App. Div. (N. Y.), 293.
Schwarzenbach v. El. Water Power Co., 101 App. Div., 345; Affd., 184 N. Y., 546.
Gilzinger v. Saugerties Water Co., 66 Hun, 173; Affd., on op. below, 142 N. Y., 632.
Hammond v. Fuller, 1 Paige Ch., 197.
Coloney v. Farrow, 91 Hun, 82.
Mudge v. Salisbury, 110 N. Y., 413.
McKee v. Delaware & Hudson Co., 125 N. Y., 353.

> "It having been determined that the erection and maintenance of the dam at its present height was unauthorized, and an invasion of the plaintiffs' rights, the court was authorized to render a mandatory judgment, requiring the defendants to lower the dam. (*Hammond v. Fuller,* 1 Paige, 197; *Corning v. The Troy Iron & Nail Factory,* 40 N. Y. 192.)"
>
> *Rothery et al v. New York Rubber Co.,* 90 N. Y., 30 at page 32.

(d) Negligence or absence of negligence on the part of the petitioner is immaterial in an action founded upon trespass.

The defendant pleads in its answer, paragraph 7, (R. 8) that it "has proceeded skillfully in the exercise of reasonable care and with due regard for the rights of others."

The defendant's counsel is confounding an action for negligence with an action for trespass. We complain of an intentional, deliberate and continuing occupation and seizure of a part of our property and negligence or lack of skill is in no way involved.

This argument, irrelevant as it is, has been heretofore disposed of by the Court of Appeals. In *Pixley v. Clark,* 35 N. Y., 520 at page 523, the Court said:

> "Was it ever held or pretended that you might build a dam, and flow another's land provided you were guilty of no want of care or skill in its construction? In fact, the better dam you make—the more skillful and perfect its construction—the more water you restrain and throw back—the greater the damage to the adjoining landowner."

That Court reached the same conclusion in *McKee v. Delaware & Hudson Co.,* 125 N. Y., 353.

Point II

The plea of navigation improvement is a mere subterfuge invented by petitioner itself to cover a theft of water power.

(a) These flashboards were installed by petitioner for its own private purposes and the plea that it was acting as the agent of the Federal government in the improvement of navigation for the benefit of interstate and foreign commerce is a mere subterfuge.

The findings of fact of the trial court on this point (R. 19-20) have been approved by the Appellate Division (R. 252-55) and affirmed by the Court of Appeals. They are amply supported by the evidence.

Petitioner's plea in regard to navigation and the power of the Federal government is sham. It is an alibi invented after the wrong was attempted to be committed.

In connection with the operation of its manufacturing plant the petitioner desired to obtain more power by installing two feet of flashboards on the crest of the dam which would increase the head of water on its hydraulic machinery.

The dam is the property of the Federal government and necessarily the first step of the petitioner was to get permission from the *owner.*

On September 22, 1924, the petitioner wrote to the United States Engineer's Office at Albany, the following letter (Plff's. Ex. 17, R. 234):

"September 22, 1924.

United States Engineer Office,
Room 401, 467 Broadway,
Albany, New York.

Gentlemen:

We have the honor to request that we be permitted to install flashboards on the Troy Dam *in connection with the operation of our power house.*

We are attaching hereto tracing and four copies of blueprints covering the said installation.

Very truly yours,

HENRY FORD & SON,

JFT.C J. F. Tholl.

(Attached to this exhibit are two blueprints showing location of Federal dam and Flashboard details.)"

On January 12, 1925, the United States Engineer's office at New York wrote to the petitioner the following letter (Plffs'. Ex. 18, R. 235):

"War Department,
United States Engineer Office,
First District, New York City,
Room 710, Army Building,
39 Whitehall St.

JB/AF
New York, N. Y.
Jan. 12, 1925.

Subject:

To: The Ford Motor Company,
Green Island Plant,
Troy, N. Y.

Gentlemen:

Referring to your request of Sept. 22, 1924, for permission to install flashboards on the Troy Dam *in connection with the operation of your power house,* there is enclosed herewith, copy of regulations approved by the Secretary of War on Dec. 2, 1924, to 'Govern the Regulation of Pool Level and Maintenance of Flashboards at the Federal Dam, Troy, N. Y., under Water Power License No. 13, Granted to Henry Ford & Son, Inc.'

For and in the absence of the District Engineer,

Very truly yours,

BREHON SOMERVELL,
Major, Corps of Engineers, Assistant.

Encl:

Hudson 377/210."

(Copy of regulations referred to in this exhibit is Defendant's Exhibit 11.)

These regulations (Deft's. Ex. 11; R. 244-45) signed by the Secretary of War make the *positive requirement and direction* that the pool shall not be permitted to fall below *the fixed crest* of the *lower* section of the dam, that is, 15.2′ above sea level B. C. D. (or 14.33′ above sea level by the Federal datum). *This elevation is 2′ below the crest of the flashboards* so that, even though the flashboards be installed, there is no requirement that the water shall be kept any higher than the crest of the dam itself.

The regulations then provide "flashboards *may be* maintained on the section of the spillway of the dam having an elevation of + 14.33 feet mean sea level (15. 2 B. C. D.) in order to increase the elevation of this section to an elevation equal to that of the auxiliary spillway, or + 16.33 feet mean sea level (17. 2 B. C. D.)."

The difference between these two provisions is obvious. The first is a mandate and command requiring the petitioner not to draw the pool below the fixed crest of the dam. The second is a mere permission of which the petitioner could avail itself or not as it desired and which permission was granted, as is stated in the accompanying letter, " in connection with the operation of your power house."

If the Federal officials had determined that these flashboards were beneficial to, or necessary for, navigation on the river they

would have *required* that they be installed and maintained and that the pool be kept up to the crest of the flashboards. But no such requirement was made.

There is not a scintilla of evidence that the Federal government determined that these flashboards were desirable for the improvement of navigation or that that matter was even considered.

All that the permission from the Secretary of War was intended to mean was that the Federal government had no objection to the petitioner using flashboards on the dam in connection with the operation of its power house.

Admissions in Pleadings.

The complaint, paragraph "Ninth" (R. 4), alleges that the *defendant* placed these flashboards on the dam and that they were so placed "*for the purpose of aiding and improving the operation of its said water power plant and of increasing the power which it could procure therefrom.*" The answer, by failure to deny, admits this allegation. (See answer, paragraph "3," (R. 6) where only the height of the flashboards is questioned.) The pleadings, therefore, establish that the *petitioner,* not the government, attached these flashboards and that they were attached for petitioner's own private purposes and not for any navigation purpose.

(b) The license was issued, not for a navigation improvement, but for a water power project for the development of surplus water power at a government dam.

The petitioner asserts (Brief, pages 16-18) that in its original application made to the Federal Water Power Commission 1920 for a license to construct a power house at the Troy dam, the use of flashboards on the dam was specifically mentioned; that the license contained a finding that this entire project was "beneficial" to navigation; and that that finding is "conclusive."

The dam and lock had been built by the government a number of years prior to this application and were in regular use for navigation purposes.

The application of the petitioner did not contemplate any navigation structures. It sought merely (R. 236) "a license to construct, maintain and operate an hydroelectric plant at the government dam upon the lands of the United States upon the west bank and in the channel of the Hudson river * * * to use the surplus water or water power at said dam." This is obviously a water power project and nothing else.

Turning to page 31 of the application, we find this significant statement of the *petitioner itself*, speaking, as the context shows, of the power plant with flashboards:

> *"So far as navigation is concerned, the effect of the power plant will be virtually negligible."*

It is upon this application that, as the petitioner asserts, the Federal Water Power Commission made a conclusive finding that the power plant and flashboards were to be constructed for the benefit of navigation.

The entire case of the petitioner is rested upon a single recital appearing in the license. The license, after referring to the application for a license to build a power plant to utilize the surplus water at the dam, says:

> "Whereas, the Commission finds that the said project, including the maps, plans, and specifications, are best adapted *to a comprehensive scheme* of improvement and utilization of said stream for purposes of navigation, of *water-power development, and of other beneficial uses;* and that the contemplated improvement is desirable and justified in the public interest for the purpose of improving and developing the Hudson River for the use and benefit of interstate or foreign commerce;"

It will be noted that the first clause does not state that the project is best adapted to the improvement of navigation, but says that it is "best adapted to a comprehensive scheme" which includes as parts thereof (1) navigation, (2) water power development, and (3) other beneficial uses. The Commission does not say in which part of this "scheme" this project falls.

The application and the license must be taken as an entirety. A single clause or phrase selected by the petitioner is not controlling.

A complete reading of the two documents shows that the project is not one for the improvement of navigation but is simply a water power project for the development of surplus water power at a government dam. The concern of the government officials in regard to navigation was only that the project *should not interfere therewith* and that is the reason that the petitioner stated in its application that the effect of the project on navigation was "*virtually negligible.*"

The effort of the petitioner to characterize this power project as a navigation improvement is preposterous. The license itself shows that it is not.

(c) The finding of the Trial Court that no navigation purpose is served by the flashboards is amply supported by the evidence.

The Trial Court found as a fact (R. 19-20):

> "Ninth. That the defendant installed said flashboards on said dam in connection with the operation of its power house.
>
> Tenth. That there is no necessity for the use of these flashboards for navigation purposes because the Government dam was designed to be sufficient under normal conditions for navigation purposes without flashboards.

> Eleventh. That the effect of the defendant's power plant and the flashboards is virtually negligible so far as navigation is concerned."

The Appellate Division has expressly approved these findings (R. 252 and 255) and they have been affirmed by the Court of Appeals.

They are fully supported by the evidence.

(1) *The petitioner's own witness,* Colonel Edward Burr, a former officer of the Engineer Corps of the United States Army, testified on cross-examination (R. 152):

> "Mr. O'Connor—So the flashboards were only put on in connection with this power plant?
>
> A. So far as I know.
>
> The Court—So that without the power plant there was no necessity for flashboards?
>
> A. *Not for navigation purposes because the government dam was designed to be sufficient under normal conditions for navigation purposes without flashboards.*"

(2) As has been heretofore pointed out, the petitioner itself in its application to the Water Power Commission for a license, speaking of the power plant *and flashboards,* said at page 31:

> *"So far as navigation is concerned, the effect of the power plant will be virtually negligible."*

(3) The correspondence between the petitioner and the War Department relating to these flashboards, which has been heretofore quoted, contains no reference whatever to the improvement of navigation, but relates solely to the use of the flashboards *"in connection with the operation of our power house."*

(4) The Federal government constructed this dam in co-operation with the Barge Canal work of the State of New York. The

Barge Canal Act (Chap. 147, Laws 1903), called for a draft in the river of twelve feet (Sect. 3). The Barge Canal channel is excavated to that depth. The mitre sills at Lock No. 1 Champlain canal and at Lock No. 2 Erie canal, *which are the only outlets from the pool formed by this dam,* afford a draft of only eleven feet (Sec. 3, Chap. 147, Laws 1903). The government channel northerly of the dam was excavated to give a channel of twelve feet in depth under the crest elevation of the Federal dam, that is, 15.2 B. C. D. (R. 126-7). No purpose is served, therefore, by any greater depth of water.

(5) The Federal dam was completed in 1915 and the pool above it has been used ever since for navigation. Yet from 1915 to 1925 no flashboards were ever installed (R. 152).

(6) If the Federal officials considered these flashboards were needed for navigation, they would have *required* the petitioner to install and maintain them. *A mere permission to the petitioner to put them on or take them off if, and when it pleases cannot be characterized as a navigation improvement.*

(7) The government regulations (Defendants Ex. 11, R. 244-5) establish conclusively that the flashboards are not needed for navigation for Regulation 1 does not require that the surface of the water shall be kept at the crest of the flashboards, but only that it shall be kept *at the crest of the fixed dam.* This is a declaration by the government officials that it is sufficient for navigation purposes if the elevation of the pool is kept up to the fixed crest of the lower spillway and that the additional depth created by the flashboards is not necessary for any navigation purpose.

Defendant introduced some evidence intended to show that the flashboards in some indefinite degree tended to improve conditions for navigation. Vague explanations were made about currents and cross-currents above the dam, but the petitioner's expert, Colonel Burr, admitted, after much discussion, that whatever slight benefit there might be of this character above the dam was counteracted by a corresponding detriment below the dam.

The petitioner, having, " for the purpose of aiding and improving the operation of its said water power plant and of increasing the power which it could procure therefrom," committed a deliberate and intentional trespass upon the water power privately owned by the respondents, cannot justify such a trespass by the plea that some incidental benefit may result to navigation if the trespass is permitted to continue.

Point III

Governmental permission does not give immunity from liability for invasion of private property rights. It is conclusive only against persons claiming under the public right of navigation.

(a) A permission or license for the installation of flashboards does not invest the petitioner with any " privilege " or " immunity " to take private property, to wit, the respondents water power, without incurring any liability.

The claim of the petitioner that it has been authorized, permitted, or licensed to erect these flashboards on the government dam, that they are therefore, " lawful structures," and that by means of them it may take the respondents' water power without incurring any liability is clearly unsound.

No Federal commission has the power to give the petitioner permission or authority or license to take or damage *the private property rights* of others without responding in damages. Nor, indeed, is there any evidence that any Federal official considered or contemplated that the petitioner would attempt to use this permission as the basis of a claim to take the property of others. That seems to have been solely an invention of petitioner.

On September 22nd, 1924, the petitioner requested that it "*be permitted* to install flashboards on the Troy dam in connection with the operation of our power house" (R. 234). In response to this request (R. 235) the Secretary of War on December 2nd, 1924, granted such "*permission*" by a regulation which said that "flashboards *may* be maintained" (R. 245). And the license merely (R. 237) "*licenses*" petitioner to construct an hydro-electric plant at the dam to develop water power.

These instruments simply give the petitioner the "permission" of the Federal government to use *government property* upon certain conditions. This is *not* a permit to use *the property of others* without paying for it.

The correspondence regarding the flashboards, the regulations, and the license constitute a determination by the government officials (1) that the power plant and flashboards will not interfere with navigation, and (2) the terms upon which the petitioner shall be permitted to use the water power owned by the government at the dam. That is all that the government officials pretended to do in this situation.

The effect of a permission of the Secretary of War under similar statute is commented on in *Cobb v. Commissioners of Lincoln Park,* 202 Ill., 427, where the Court said:

> "We are of the opinion that the act prohibiting the erection of wharves without the consent of the Secretary of War is a mere regulation for the benefit of commerce and navigation, and that *the license or permission of the Secretary of War is only a finding and declaration of such officer that such proposed structure would not interfere with, or be detrimental to, navigation.*"

The claim of the petitioner that this permission or license also invested it with a "privilege and immunity" to seize the private property of others is clearly unsound.

In *Pumpelly v. Green Bay Company,* 80 U. S. (30 Wall.) 166, the situation was similar to the present one. The defenant constructed a dam which flooded plaintiff's lands and claimed immunity from suit and liability on the ground that it was authorized by an act of the Legislature of the State of Wisconsin to build a dam. This Court, however, upheld a demurrer to this defense.

In *Hopkins v. Clemson College,* 221 U. S., 636, the defendant, under specific legislative authority, constructed a dyke on the State land which diverted water to the injury of the plaintiff's land. The defendant claimed an "immunity" but this Court said (p. 643):

> "Neither a State nor an individual can confer upon an agent authority to commit a tort so as to excuse the perpetrator. In such cases the law of agency has no application—the wrongdoer is treated as a principal and individually liable for the damages inflicted and subject to injunction against the commission of acts causing irreparable injury."

In *Sammons v. City of Gloversville,* 175 N. Y. 346, the charter of the city authorized it to discharge sewage into Cayadutta creek and, in an action by a riparian owner on that creek complaining of pollution, the city claimed that that permission in its charter gave it the right to pollute the creek without incurring liability. The Court of Appeals, however, said (p. 352):

> "This is a permission and not a direction, and a legislative permission neither implies a right to appropriate property, without compensation; nor confers a license to commit a nuisance."

In *Gardner v. Newburgh,* 2 Johns. Ch. 162, the Village of Newburgh was authorized by a special act of the Legislature to divert the waters of a stream for water supply purposes. A lower

riparian owner brought a suit in equity for injunction to restrain the prosecution of the work on the ground that no provision had been made for compensation for the damage which would be done to him. Chancellor Kent granted the injunction, holding that legislative authority did not justify the taking of property without compensation.

It would indeed be surprising if, despite the Fifth Amendment to the Constitution, a letter, accompanied by some regulations signed by the Secretary of War, or even a license from the Power Commission gave an individual the right to seize the property of others for his own private purposes with "immunity." Petitioner's counsel seems to conceive that this permission or license is something like a hunting license with which the fortunate holder has the "privilege" of going forth and bagging any property which he may desire for his own purposes without any obligation of paying therefor. If our Constitution means anything, neither Congress nor any Federal official has the power to grant such outrageous "privileges" and "immunities" to any favored individual.

> "The legislature could not authorize such an injury without requiring payment for the consequences."
>
> *Sammons v. City of Gloversville,* 175 N. Y., 346, at 352.

> "If, therefore, a corporation or an officer should be authorized by a statute to take the property of individuals for any purpose, however public or generally beneficial, without compensation, or, for a private use, making compensation, the pretended authority would be wholly void, and, of course, could afford no protection to any one."
>
> *Bellinger v. The New York Central Railroad,* 23 N. Y., 42, at page 48.

(b) The cases cited by petitioner establishing that governmental permission to maintain a structure in navigable waters is conclusive as against anyone claiming under the public right of navigation do not sustain the claim that such permission gives any immunity as against persons claiming that their private property rights have been invaded.

Petitioner offers an array of authorities in support of its claim that the governmental permission or license is "*conclusive*" against these respondents and that, since it is acting "under the authority of law," the flashboards are "lawful structures."

The cases referred to establish that where the Federal or State government permits the erection of a structure in navigable waters, it may not be complained of as a *public* nuisance—that is, as an interference with the *public* right of navigation. The governmental permission or license is a bar to anyone claiming under the *public* right.

Chancellor Walworth said in *Lansing v. Smith*, 2 Wend. (N. Y.) 1 at page 21:

> "The right to navigate the public waters of the state and to fish therein, and the right to use the public highways, are all *public* rights belonging to the people at large. They are not the *private* unalienable rights of each individual. Hence the legislature as the representatives of the public may restrict and regulate the exercise of those rights in such manner as may be deemed most beneficial to the public at large; provided they do not interfere with vested rights which have been granted to individuals."

In such cases the governmental consent may properly be termed "conclusive" and as investing the permittee with a privilege or immunity from liability *to any one claiming under such public right.* If the respondents were asserting that the flashboards or the power plant interfered with the navigation of the

river, then it might properly be said that they were concluded by the Federal consent.

But respondents are not claiming under any such *public right*. Concededly they own this dam and water power. They claim that these *private property rights* have been invaded—that a trespass has been committed on privately owned real property. It has never been held that a mere permission of the government invested anyone with a privilege or immunity to take or injure private property rights with impunity.

In this class of cases cited by petitioner are the following:

Miller v. Mayor of New York, 109 U. S., 385.
Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U. S., 421.
Wisconsin v. Duluth, 96 U. S., 379.
South Carolina v. Georgia, 93 U. S., 4.
Sewell v. Arundel Corp., 20 Fed. (2d), 503.
People v. Hudson River Conn. R. R. Co., 228 N. Y., 203.
Southern Pacific R. R. v. Olympian Dredging Co., 260 U. S., 205.

In *Miller v. Mayor of New York, supra*, a navigator of the East river complained of the Brooklyn Bridge as an obstruction to the *public* right of navigation. The Court held that since both the Federal and State governments had approved the erection of this bridge, therefore, no person claiming under the *public right* of navigation could complain of it as a public nuisance—as an obstruction of, or interference with, that public right.

In *Pennsylvania v. Wheeling & Belmont Bridge Company* (*supra*), the Supreme Court held that even though a bridge was an obstruction to navigation and, therefore, a public nuisance, nevertheless, Congress could, by special act, legalize its maintenance and thereafter a State could not complain of such interference with navigation.

In *Wisconsin v. Duluth* (*supra*), the cutting of a channel from Lake Superior into Duluth harbor was instituted by the City of Duluth, Minnesota, but thereafter was carried on by annual Federal appropriations. The State of Wisconsin sought a mandatory injunction requiring the City of Duluth to fill up the channel which the Federal government had excavated, claiming that the diversion of water resulting from the work was interfering with the navigation of boats from the lake into Superior City, Wisconsin.

In *South Carolina v. Georgia* (*supra*), an improvement in Savannah harbor at the mouth of the Savannah river was being made by the War Department under a Congressional appropriation and the State of South Carolina endeavored to enjoin the work on the ground that the channels on the Georgia side were favored.

In *Sewell v. Arundel Corporation* (*supra*), taxpayers in Miami, Florida, attempted to enjoin work in Miami harbor by a government contractor under a Congressional appropriation on the ground that an island was being built up which would be an obstruction to navigation. The Court held that an obstruction to navigation created by Congress did not constitute a public nuisance.

In *People v. Hudson River Connection R. R. Co.*, (*supra*), there were two main points involved——

In the *first* of these, it appeared that the State Legislature had, by special act, granted a franchise to the defendant to construct a bridge in the bed of the Hudson river at Castleton and thereafter attempted to repeal that act. The Court held that the franchise granted by the special act was a property right which could not "be forfeited by mere legislative enactment."

The *second* point involved was that the Secretary of War, pursuant to a special act of Congress, had given his consent to a bridge with piers in the channel of the river and the State Legislature thereafter endeavord, by statute, to require a single span

bridge, the State claiming that the piers in the river would constitute an obstruction to navigation. The Court held, however, that the Federal power of regulation over navigation is paramount and superior to that of the State over the same subject and that the determination of the Federal government that the piers would *not* constitute an obstruction to navigation could not be overruled by the State.

The case means simply that in the determination of what is or is not a *public* nuisance—that is, an obstruction to the public right of navigation—the Federal power is superior to that of the State.

In *Southern Pacific R. R. v. Olympian Dredging Co., supra,* a boat was damaged by running against piles left in the bed of the river by a railroad company with the consent of the Secretary of War. It was held that the consent of the Secretary of War was a conclusive determination that the piles did not interfere with navigation and that, therefore, there was no liability on the part of the railroad company.

POINT IV

Congress did not, by the Federal Water Power Act, assume to invest licensees with the privilege of taking or damaging the property of others with impunity. On the contrary, the Act expressly provides that compensation shall be made for the property of others which may be used or damaged, that the licensee shall be liable for all damages to the property of others, and that no vested rights in waters shall be affected or interfered with.

We do not believe that either the Power Commission or the Secretary of War intended to give the petitioner any privilege to take or damage the property of the respondents without liability. Nor did Congress intend to invest the petitioner with any such unconscionable privilege. Such virtue is attributed to this permission or license exclusively by the petitioner.

As an affirmative defense (R. 7-8) the petitioner asserts that Congress, by the Federal Water Power Act of 1920 and by the license granted thereunder, invested the petitioner with this "privilege and immunity."

Assuming (but by no means conceding) that Congress has the power to invest the petitioner with such a privilege, the burden is unquestionably upon the petitioner to show from the terms of the Water Power Act that Congress intended to grant it.

Yet that the Act, in very plain terms, expresses a directly opposite intention.

U. S. C. A. Title 16, *Section* 814.

By this section licenses are given the right of eminent domain and the District Courts are given the power to determine the amount of *compensation* to be paid for "an unimproved dam site or *the right to use or damage the lands or property of others* necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce."

U. S. C. A., Title 16, *Section* 803*c*.

This subdivision contains the following provision:

> "*Each licensee hereunder shall be liable for all damages occasioned to the property of others* by the construction, maintenance, or operation of the project works

> or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor."

U. S. C. A., Title 16, *Section* 821.

This section reads as follows:

> " Nothing contained in this chapter shall be construed *as affecting or intending to affect or in any way to interfere* with the laws of the respective States relating to the control, appropriation, *use,* or distribution of *water* used in irrigation or for municipal or *other uses, or any vested right acquired therein.*"

These provisions clearly manifest the intention of Congress that compensation shall be made for all property damaged, used, or taken in connection with any project licensed under the act.

If Congress has the power to take or authorize the taking of respondents' water power without compensation, which we deny. (See Point VI, *infra*), plainly it has elected not to exercise such power. The same attitude was taken by the Legislature of the State of New York in regard to railroad bridges affected by the construction by the State of the Barge canal.

> *Lehigh Valley R. R. Co. v. Canal Board,* 204 N. Y. 471.
>
> Affirming, 146 App. Div. 161 and approving the opinion of the Appellate Division.
>
> *Oswego & Syracuse R. R. Co. v. State,* 226 N. Y. 351.

The Act of 1920 is entitled the Federal *Water Power* Act (U. S. C. A., Title 16, Sect. 791). It contemplates the private development of water power.

There is no provision for governmental construction either of water power or of navigation structures.

It provides a plan whereby the government, after giving due consideration to the navigation interest, gives its consent to the development of water powers in navigable rivers by private corporations for the profit to be derived therefrom. *It contemplates private enterprise and private profit.* The licensee enters upon the development only if he is satisfied that the necessary investment will yield him a satisfactory return

It is no more than reasonable that Congress should require that in the prosecution of such an enterprise the licensee should pay "all damages occasioned to the property of others."

The provisions of the act which we have quoted above accord with common justice and fairness. On the other hand, in the absence of definite and positive language, the intention should not be imputed to Congress to grant to these private corporations, engaged in the development of water power for private profit, the privilege of seizing the water power of others without compensation, even if Congress has the power to do so, which we deny.

Evidently at the time the petitioner filed its application with the Water Power Commission it assumed that it would have to pay for the flowage rights necessary for the maintenance of flashboards.

On page 41 of the application, as a part of the "Estimated Cost" of the proposed development appears the following:

"POOL

Field investigation to determine extent of flowage due to flashboards on spillway. . . . . 7,500."

If defendant was to have immunity, why spend this amount of money to determine the damage which would be caused by the flashboards?

The petitioner expressly and in writing accepted all of the terms and conditions of the Water Power Act including Section

803c. Its license was granted (R. 237) *" subject, however, to the following conditions:*

> 1. *The terms and conditions of the Act,* the rules and regulations of the Commission pursuant thereto, in force on the date of this license, and all other statutes pertaining to the subject matter, in so far as applicable, *are hereby made a part of this license as though fully set out herein."*

The petitioner was required by the Power Commission to sign an acceptance of the license which acceptance reads in part as follows (R. 242):

> " THIS LICENSE is also executed by the Licensee this 29th day of March, 1921, in testimony of the *acceptance by the Licensee of all the terms and conditions of the Federal Water Power Act* of June 10, 1920, and of the further conditions imposed in this license."

Petitioner's Argument as to Section 803*c.*

Petitioner suggests that the Act should be construed to provide compensation only for a " taking " and that the damage here is only " consequential." Obviously the petitioner " took " our water power and converted it to its own use at Troy.

Aside from this, the difficulty with this argument is that the statute does not use the word " take " but covers *" all damages "* and " the right *to use or damage* the lands or property of others."

Petitioner (Brief, pp. 33-5) discusses Sect. 803c as if the respondents were endeavoring to spell out a cause of action from the terms of the Act. Our cause of action arises from the ownership of realty and a trespass thereon. It is the *petitioner* which is offering the Act as an affirmative defense, as the source of its alleged immunity from liability.

The petitioner argues that this section is only "an immunity clause for the protection of the United States." If that was the only purpose of Congress, it need have said only that the United States should not be liable for any act of the licensee. But it commences the sentence with the specific, positive and unambiguous statement:

> "Each licensee hereunder shall be liable for all damages occasioned to the property of others," etc.

We do not know how Congress could have expressed a very simple idea in any clearer terms.

Nor does the fact that a separate and distinct clause was added, to the effect that the United States should not be liable, in any way detract from the explicit provision quoted above.

Point V

If, as contended by the petitioner, the Secretary of War or the Federal Power Commission, by the correspondence, the regulations, and the license purported to invest petitioner with "the title, right, privilege, and immunity . . . to erect and maintain said flashboards" and thereby take a portion of respondents' water power and convert it to its own use for private power purposes at Troy, their acts are clearly void.

As we have heretofore pointed out, the official records of the transaction show that this is a water power project for the development of water power at a government owned dam; that these flashboards were to be installed in connection with the operation of petitioner's power plant.

We may assume (without investigating the question) that the Federal government owns the water power made available by the dam which it built.

But the additional water power which, by means of these flashboards, the petitioner seeks to take from respondents at Waterford and make available for its own use at Troy is concededly owned by the respondents.

It is this water power of respondents, as distinguished from that created by the navigation dam, that is involved in this litigation.

There are three equally valid reasons why this water power may not be taken from respondents under such an alleged "privilege."

(1) *The Federal government may not authorize a taking for a water power purpose.*

In view of the stipulation that the respondents own this water power, there can be no claim that the Federal government has any proprietary interest therein. There would be no foundation anyway for such a claim.

Groat v. Moak, 94 N. Y. 115 at page 128-9.
People v. International Bridge Co., 223 N. Y. 137 at page 145.

Its powers on the Hudson river are limited to navigation. It may waive an objection to the flashboards and certify that they do not interfere with navigation, but *it may not authorize their erection for water power purposes because that is not a matter within the control of the Federal government.*

Kansas v. Colorado, 205 U. S. 46.
Wisconsin v. Illinois, 278 U. S. 367.

In *Kansas v. Colorado* it was held that the power of Congress to control the flow of a stream is limited to the preservation or

improvement of navigability and does not include irrigation. In *Wisconsin v. Illinois* it was held that Congress could not authorize a diversion of water for the purpose of sewage disposal.

In *Kansas v. Colorado* Mr. Justice Brewer reviews at length the principles underlying these decisions.

It is urged by the petitioner that the courts may not go into the question of whether these flashboards and the power plant were erected for water power purposes; that the respondents and the courts are "concluded" by certain phrases in the license which, as the petitioner contends, purport to find and declare that the flashboards and the power plant are for the improvement of navigation. This is clearly unsound.

In the first place, the application, the license, the regulations, and the letters relating to the flashboards, taken in their entirety, show a water power project and nothing else.

In the second place, this is not a matter of the discretion of a Federal official. The question is whether this purported exercise of power is within or without the constitutional powers of the Federal government. Upon such a question it is absurd to claim that a Federal official's declaration or finding can extend the powers of the Federal government beyond constitutional limitations. Neither Congress nor any Federal official or commission can extend his or its powers by "conclusive" declarations and findings that it is acting within them.

> "The legislature cannot make a particular use, either public or private, merely by so declaring it. If it could do so, the constitutional restraint would be utterly nugatory."
>
> *Arnsberger v. Crawford,* 101 Md. 247; 70 L. R. A. 497.

> "Even the legislature cannot, by calling it such transform into a street use one which is not such, and cannot authorize without compensation as against abutting

> owners a use of streets not included within or consistent with their power purposes and which are productive of special damages to such abutting owners."
>
> *Matter of City of New York (New Street)*, 215 N. Y., 109 at p. 117.

The Legislature cannot make a river a public highway for navigation merely by declaring it to be such when in fact it is not.

Morgan v. King, 35 N. Y. 454.

Where the question is one of the *power* of the Federal government itself under the Constitution, the court must determine whether the attempted exertion of power is *intra* or *ultra vires*.

If the contention of the petitioner were sustained, the Federal Power Commission, by the very simple expedient of inserting formal findings or recitals in its licenses and permits, could extend its powers without regard to constitutional restrictions.

(2) *It may not authorize a taking for a private purpose.*

Petitioner is not a public service corporation but is a private corporation, a subsidiary of the Ford Motor Company which is also a private corporation engaged in the manufacture of automobiles (R. 19).

Neither the Federal nor the State government could authorize the petitioner to take for its private manufacturing purposes, water power owned by the respondents and used by them for manufacturing purposes even though compensation were provided. Such a taking would not be for a public purpose.

> "Upon the other hand, it is probably true that it is beyond the competency of the State to appropriate to itself the property of indivduals for the sole purpose of creating a water power to be leased for manufacturing purposes. This would be a case of taking the property

of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain."

Kaukauna Co. v. Green Bay &c. Canal Co., 142 U. S. 254 at p. 273.

(3) *It may not authorize a taking without compensation.*

The powers of the Federal government, including the power to regulate commerce, are subject to the Fifth Amendment.

Monongahela Navigation Co. v. United States, 148 U. S. 312 at p. 336.

United States v. Cress, 243 U. S. 316 at p. 320.

It is stipulated that the respondents own the water power in question.

An exertion of Federal power whereby the petitioner was authorized to take this property from the respondents without compensation would be a clear violation of the Fifth Amendment.

United States v. Cress, supra.

Monongahela Navigation Co. v. United States, supra.

United States v. Lynah, 188 U. S. 445.

Petitioner claims (brief, pages 25-26) that it "has purchased from the Federal government the right to erect these flashboards" and that it has "acquired from the government something which the government owned and had the right to sell."

The water power involved in this litigation is not the water power developed by the government dam, but the additional water power which, as the petitioner has stipulated, belongs to the respondents. Whence cometh the right of the government to sell our water power to the Ford Motor Company?

POINT VI

The Federal Government has not the right, without making compensation, to take from the respondents water power concededly owned by them and transfer the same to the possession and use either of itself or of its licensee at Troy even though the transaction be characterized as a navigation improvement.

(a) The cases of United States v. Cress and American Woolen Co. v. State of New York are exactly in point.

The final point of petitioner (brief, pages 35-46) is that the Federal government, in the course of a navigation improvement, has the right to raise the Troy dam and thereby take the respondents' water power from their possession and use and transfer it to the possession and use of itself or its licensee at Troy without making any compensation therefor.

We believe that this question is not involved in this case which should be disposed of upon the grounds hereinbefore discussed. However, we shall not permit this claim of the petitioner to pass as admitted, for it is without foundation in law.

The theory of the petitioner is that the respondents' ownership of the water power is subject to an easement or "servitude" and that this easement includes the right of the government to take the water power from the respondents for a navigation improvement without compensation.

Respondents' dam is located in an unnavigable portion of the Mohawk River (R. 21). No claim is made that it in any way interferes with navigation or that it constitutes a public nuisance.

It is clear, too, that such action by the government would constitute an actual taking, for the water power owned and possessed by the respondents at Waterford would be physically taken downstream to the Troy dam and there appropriated to the use of the government or its licensee.

The government would have thus converted a public easement of passage into an ownership in fee.

In view of the fact that the petitioner has stipulated, without limitation, that we own this water power, we do not think that it is in a position to contend in this case that our ownership is such a limited or qualified one. To sustain such a contention would substantially destroy the effect of the stipulation.

However, this Court has heretofore fully disposed of this claim of the petitioner in *United States v. Cress,* 243 U. S. 316, and its decision therein was based upon *New York authorities.*

In that case the government itself had constructed a dam in the Kentucky river for navigation purposes. Cress owned a water power and dam in a tributary stream. The government dam raised the level of the water to within a foot of the crest of claimant's dam.

The contention was advanced by the government that claimant's riparian rights were subject to a servitude for the benefit of navigation and that, therefore, Cress was entitled to no compensation for being deprived of his water power.

This power was located on a non-navigable tributary but the Court assumed that claimant's rights were "no greater than if they had been riparian owners" on the river itself (page 319).

The Court pointed out that the extent of the private property rights of claimant and of the alleged "servitude" must be determined under local law.

Citing, among others, the leading New York cases on the subject, the Court said (page 321):

> "In Kentucky, and in other States that have rejected the common-law test of tidal flow and adopted the test

of navigability in fact, while recognizing private ownership of the beds of navigable streams, numerous cases have arisen where it has been necessary to draw the line between public and private right in waters alleged to be navigable; and by an unbroken current of authorities it has become well established that the test of navigability in fact is to be applied to the stream *in its natural condition, not as artificially raised by dams or similar structures; that the public right is to be measured by the capacity of the stream for valuable public use in its natural condition; that riparian owners have a right to the enjoyment of the natural flow without burden or hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation with appropriate compensation for the private right.* Cases exemplifying these propositions are cited in a marginal note. We have found no case to the contrary. An apparent but not a real exception is the New York case of *Canal Appraisers v. People ex rel. Tibbits* (1836), 17 Wend. 571, where the decision was rested (pp. 609, 612, 624) upon the ground that the bed of the Mohawk River was the property of the State; the authority of the case having been limited accordingly by later decisions of the court of last resort of that State. *Commissioners of Canal Fund v. Kempshall,* 26 Wend. 404, 416; *Child v. Starr,* 4 Hill, 369, 372; *Fort Plain Bridge Co. v. Smith,* 30 N. Y. 44, 63; *Smith v. City of Rochester,* 92 N. Y. 463, 482; *Fulton L. H. & P. Co. v. State,* 200 N. Y. 400, 413."

Again the Court said (pages 325-6):

"It follows from what we have said that the servitude of privately-owned lands forming the banks and bed of a stream to the interests of navigation *is a natural servitude, confined to such streams as in their ordinary and natural condition are navigable in fact, and confined*

> *to the natural condition of the stream.* And, assuming that the riparian owners upon non-navigable tributaries of navigable streams are subject to such inconveniences as may arise from the exercise of the common right of navigation, this in like manner must be limited to the *natural right.*"

Having reached this conclusion the Court proceeded to say (page 326):

> "We intimate no doubt of the power of the United States to carry out this kind of improvement."
>
> * * * * *
>
> "But the authority to make such improvements is only a branch of the power to regulate interstate and foreign commerce, and, as already stated, this power, like others, must be exercised, when private property is taken, in subordination to the Fifth Amendment."

Answering the assertion that there was no "taking" the Court said (pages 329-30):

> "In No. 718 there is a contention that, because the back-water is confined to Miller's Creek, it does not amount to a taking of land. But the findings render it plain that it had the necessary effect of raising the creek below the dam to such an extent as to destroy the power of the mill dam that was essential to the value of the mill; or, as the findings put it, 'The water above the lock and dam, when it is at pool stage, is about one foot below the crest of the mill dam, which prevents the drop in the current which is necessary to run the mill.' Under the law of Kentucky, ownership of the bed of the creek, subject only to the natural flow of the water, is recognized as fully as ownership of the mill itself. The right to have the water flow away from the mill dam unobstructed except as in the course of nature, is not a mere easement or appurtenance, but exists *by the law*

of nature as an inseparable part of the land. *A destruction of this right is a taking of a part of the land.*"

This is substantially the same definition of property rights in water power as is given by the Court of Appeals of New York when, referring to a power on the Hudson river, it said:

> " The rule of law is familiar that each owner of land contiguous to a natural watercourse has a right, as owner of such land and as naturally connected with and incident to it, *to the natural flow of the stream along his land and its descent, and all the force to be derived therefrom,* for any domestic or hydraulic purpose to which he may decide to apply it. * * * *Those are riparian rights, are natural and inherent, and inherent, and a part of the estate of each riparian owner.*"
>
> * * * * *
>
> " The right to the use of the water of a flowing stream, navigable or unnavigable, arises by mere operation of law as incident to the ownership of *the bank* and *is a part of the estate of its owner.* (Citing cases.) *It is a valuable property right* which can be severed from the riparian land by grant, condemnation, relinquishment or prescription."
>
> *United P. B. Co. v. Iroquois P. & P. Co.,* 226 N. Y., pp. 44-47.

The exact point has also been passed upon in *American Woolen Co. v. State,* 195 App. Div. (N. Y.) 698. In that case, in the course of the canalization of the Oswego river, a Barge Canal dam was constructed by the State in that river to such height that it backed water on claimant's water power upstream. For this the State was held liable. The Court said at pages 703-4:

> "*We follow the authority of Oswego & Syracuse R. R. Co. v. State* (226 N. Y. 351) that to destroy property is to appropriate it, and we hold that the *destruc-*

tion of the water rights of the claimant at the level long existing, if they were so destroyed, is an appropriation of the property, and that if property is actually taken by the State for a public use, and the owner is excluded from its possession and loses the rights and benefits to which he was theretofore entitled, then there is an appropriation of the property for which the State is bound to make compensation if a claim is seasonably filed. (*Scriver v. Smith,* 100 N. Y. 471; *Pumpelly v. Green Bay Co.,* 13 Wall., 166; *United States v. Cress,* 243 U. S. 316, 330; *Fulton Light H. & P. Co. v. State of New York,* 200 N. Y. 400; *Meneely v. Kinser Construction Co.,* 128 App. Div. 799; *United States v. North American Co.,* 253 U. S. 330; *Oswego & Syracuse R. R. Co. v. State, supra.*)"

We also refer to the learned opinion of Judge Brewer in *Monogahela Navigation Co. v. United States,* 148 U. S. 312, where some of the principles involved here are discussed at great length.

See also,

Kaukauna Water Power Co. v. Great Bay Canal Co., 142 U. S. 254.

United States v. Lynah, 188 U. S. 471.

Commr's of Canal Fund v. Kempshall, 26 Wend. (N. Y.) 414.

Petitioner endeavors to distinguish the *Cress* case upon three grounds:

First: It asserts (brief, page 40) that in that case the water power was on a non-navigable stream.

However, the Court expressly stated (page 319) that it would decide the case upon the assumption " that the rights of defendants in error are no greater than if they had been riparian owners upon the rivers, instead of upon the tributary creeks."

Furthermore, the Court found in our case (R. 21) that our dam is located in a portion of the river which is incapable of navigation.

Second: Petitioner says (brief, pages 41–2) that in the *Cress* case there was a "physical invasion of property by backing water upon it" whereas in this case there is only a "partial destruction of the use of the water." It appears that in the *Cress* case (page 319) "*no part of the land or mill is overflowed or covered by pool stage of water, nor is the mill physically damaged thereby.*"

Petitioner suggests that in our case there is only a "partial" destruction. As a matter of fact, the entire water power was not flooded in the *Cress* case. However, there can be no distinction in principle between taking a part of a man's water power and the taking of the whole thereof.

Third: Finally, petitioner asserts (Brief, pages 40–41) that we do not own the bed of the Mohawk and that, therefore, our rights in the water power are in some way different from those of the claimant in the *Cress* case.

Before the trial of this case, petitioner stipulated (R. 232) that the respondents owned this water power. It is submitted that the petitioner may not at this time avoid this stipulation and claim that our ownership is incomplete or deficient in any particular. As owners of the water power, our rights are necessarily the same as the rights of the claimant in the *Cress* case.

Nor is there the slightest evidence in the record that we do not own the bed of the Mohawk river. Relying upon the stipulation, we offered no proof of title and the patents and grants through which our title is derived are not before the Court. It is from those and those alone that a court could determine whether or not we own the bed of the Mohawk river opposite our lands.

As authority for its statement, petitioner cites three cases arising on the Mohawk river—the *Tibbits* case, 17 Wend. 571; the *Danes* case, 219 N. Y. 67, and the *Loomis* case, 33 N. Y. 461. Those cases hold that the boundaries of the particular patents there involved were not sufficient to carry title to the bed of the river.

On the other hand, there are two other Mohawk river cases—*Williams v. City of Utica,* 217 N. Y. 162 and *Haselo v. State,* 187 App. Div. 804 in which the courts held that the descriptions in the particular patents there involved *did* carry title to the bed of the Mohawk river.

The rules enunciated in those cases are simply rules of construction which are meaningless unless there is a patent before the Court to which the rules can be applied.

The petitioner refers to the *Tibbits* case as arising at "almost identically the same spot" as this case. This is not correct. The Tibbits property was located some two miles from claimant's site.

The decision in that case (which was arrived at by a 13 to 11 vote) was based on two features which entirely distinguished it from our situation (1) *the tide ebbed and flowed* at the *locus in quo* (17 Wend., page 605), and (2) Tibbits claim under the Van Rensselaer patent, *a Dutch patent* which, under the civil law applicable thereto, did not carry any property rights in the river (17 Wendell 609). The English later confirmed the Dutch patent, but the Court approved the view (page 609 that "*as the Dutch grant under the civil law carried the grantee only to the edge of the stream,* so the patents of confirmation in 1685 and 1705, only confirmed to him the property that had previously been granted, and to no greater extent."

The tide does not extend to respondents' lands (R. 21) and, while it does not appear in this record, the fact is that our property is held under an English patent granted by the English Crown during the period of English sovereignty in the Colony of New

York. It must be construed by the rules of the English common law and it is, of course, impossible for this Court to construe it because it is not in the record.

The assertion of petitioner that we do not own the bed of the Mohawk is without foundation in the record and its statement that this case arose at "almost identically the same spot" as the *Tibbits* case is untrue and misleading.

Even if we did not own the bed, nevertheless, our absolute property rights in the water power are just as definite under the laws of New York as if we did own the bed.

We refer again to the language of our Court of Appeals in *United Paper Board Co. v. Iroquois Pulp & Paper Co.*, 226 N. Y. 38 which we previously quoted under this Point (*supra*, page 39.) The Court there declared that the owner of the bank owned the water power, that it was an inherent part of his estate, and was a valuable property right.

(b) The decisions in the Cress case and the American Woolen Co. case are based, not upon technicalities, but upon broad principles arising out of the nature of water power and its utilization. Water power can be taken but it cannot be destroyed.

The development and utilization of water power is at least as important to the welfare and progress of the country as navigation on inland waterways. Owing to the magnitude of the initial investment in fixed and immovable structures necessary in any hydraulic development, security as to the future enjoyment of such property is essential if our resources are to be developed. It should be accorded the same constitutional protection as other forms of property.

The adoption of the theories proposed by the petitioner would leave the enjoyment of the use of water power a very uncertain

tenure and could not fail to deter, to a substantial extent, hydro-electric development.

There is nothing new about the private ownership and development of water power. It has existed for centuries in England and, from the very foundation of the English Colony of New York, privately developed water powers, operating saw mills, grist mills, and woolen mills, were the heart of the industrial development of the Colony.

By the English common law grants bounded upon fresh water rivers were presumed to carry title to the water power (unless there were words of exclusion) for the very obvious reason that *the owner of the bank was the only one who could utilize it.* A doctrine that the sovereign owned the water power while the individual owned the banks would have meant that neither could act and development would have been paralyzed.

By reason of its physical characteristics, water power may be taken and transferred, but it cannot be destroyed.

We believe that the *Cress* case and the *American Woolen Co.* case rest upon broad fundamental principles arising out of the physical nature of water power and not upon any fine-spun technicalities.

There is no essential conflict between water power and navigation and the friction between the two is very largely the result of bad faith.

Navigation requires a substantially level stretch of water. At such points water power does not exist.

At the falls and rapids where water power is present, navigation is usually impossible or impractical.

A dam makes available an abrupt fall for water power purposes and at the same time provides a pool for navigation. A lock through the dam enables boats to pass yet there is no substantial

interference with the power development as the amount of water used for lockages is negligible.

If, in the construction of a navigation dam, it is necessary for the government to appropriate water power property, there can be no objection, even apart from constitutional provisions, to a requirement that the government pay for the water power for it gets value for its money. When the dam is completed the government has not only provided for navigation but it has also acquired for itself a valuable water power which it can, and almost invariably does, sell or lease.

If the government constructs a navigation dam to such height as to back water upon an upstream water power, *it does not destroy that power. It simply transfers it downstream to the new dam where it is available to the government for lease or sale.*

Is it unreasonable that the government must pay for water power which it thus takes unto itself from a private owner?

To call this mere "consequential damage" is dishonest. There has been nothing destroyed. The water power, owned and possessed by the citizen, has been taken from him and that same identical power is now in the possession, ownership, and enjoyment of the government, just as valuable and as useful as it was before. That is a "taking" in every sense of the word.

As this Court said in the *Monongahela* case, 148 U. S. at pages 337–8:

> "And here it may be noticed that, after taking this property, the government will have the right to exact the same tolls the Navigation Company has been receiving. It would seem strange that if by asserting its right to take the property, the government could strip it largely of its value, destroying all that value which comes from the receipt of tolls, and, having taken the property at this reduced valuation, immediately possess and enjoy all the profits from the collection of the same

> tolls. *In other words, by the contention this element of value exists before and after the taking, and disappears only during the very moment and process of taking. Surely, reasoning which leads to such a result must have some vice, at least the vice of injustice."*

Water power cannot be destroyed. It may be transferred from one location to another but it still exists without any impairment or diminution. It is not " damaged." It is taken.

It is this peculiar physical characteristic which distinguishes water power cases.

When the government, in the course of a navigation improvement, takes the water power of a citizen and converts it to its own possession, use, and enjoyment, the government should pay to the citizen the just equivalent not only because of constitutional provisions but also because of the most elementary principles of common justice.

(c) In the Tibbits case, the Chandler-Dunbar case, and Monongahela Navigation Co. v. Coons, the riparian owner did not own the water power and they are, therefore, not authority in this case for it is stipulated that respondents do own the water power and the dam.

In support of its claim that respondents' water power may be taken from them by the government without compensation, petitioner cites *Canal Appraisers v. Tibbits,* 17 Wend. (N. Y.) 571, *Monongahela Navigation Co. v. Coons,* 6 Watts & Serg., 101, and *United States v. Chandler-Dunbar Co.,* 229 U. S. 53.

There is no case in New York in which it has been held that water power, owned by a citizen, may be taken, either by the state or by the national government, for a navigation improvement without the payment of compensation. Nor have we ever found

any case elsewhere in this country where such a ruling has been made.

As this Court said in the *Cress* case (243 U. S., at page 322, the *Tibbits* case is "an apparent but not a real exception." It rests upon the proposition that the riparian owner in that case did not own any interest in the river nor in the water power for the reasons hereinbefore explained, "the authority of the case having been limited accordingly by later decisions of the court of last resort of that state" (243 U. S., at page 322).

The case of *Monongahela Navigation Co. v. Coons,* 6 Watts & Serg., 101, is a Pennsylvania case. It has been the uniform rule in Pennsylvania since the decision of *Carson v. Blazer,* 2 Binney, 475, in 1807, that a riparian owner has no interest whatever in the water power. This Court said in *Shively v. Bowlby,* 152 U. S. at page 32:

> "It was because of this difference in the law of Pennsylvania from that of England and of most of the older States, and because the decisions of the Supreme Court of Pennsylvania upon the subject were deemed binding precedents, that this court, speaking by Mr. Justice Grier, held that riparian owners, erecting dams on navigable rivers in Pennsylvania, did so only by license from the State, revocable at its pleasure, and could therefore claim no compensation for injuries caused to such dams by subsequent improvements under authority of the State for the convenience of navigation; and also that by the law of Pennsylvania preëmption rights to islands in such rivers could not be obtained by settlement. *Rundle v. Delaware & Raritan Canal* (1852), 14 How. 80, 91, 93, 94; *Fisher v. Haldeman* (1857), 20 How. 186, 194."

In the *Monongahela Navigation Company* case there was not even a claim that the riparian owner owned the water power, the

sole question discussed and decided being whether, under the statutes involved, the license to construct a dam was revocable or irrevocable.

In *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, all the property rights of the Chandler-Dunbar Co. in the river and along the uplands were specifically appropriated under the explicit direction of Congress so that *there was no doubt that there was a "taking."* The only question was what property rights the company owned. The Court commenced the opinion with this statement (page 60):

> "From the foregoing it will be seen that the controlling questions are, first, whether the Chandler-Dunbar Company has any private property in the water power capacity of the rapids and falls of the St. Marys River which has been 'taken,' and for which compensation must be made under the Fifth Amendment to the Constitution; and, second, if so, what is the extent of its water power right and how shall the compensation be measured?"

The Court finds (page 74) that the Chandler-Dunbar Co. "had no property right in the river which has been 'taken.'"

It finally concludes this point as follows (page 76):

> "*Having decided that the Chandler-Dunbar Company as riparian owners had no such vested property right in the water power inherent in the falls and rapids of the river, and no right to place in the river the works essential to any practical use of the flow of the river,* the Government cannot be justly required to pay for an element of value which did not inhere in these parcels as upland. The Government had dominion over the water power of the rapids and falls and cannot be required to pay any hypothetical additional value to *a riparian owner who had no right to appropriate the current to his own commercial use.*"

Since this was an actual taking, an appropriation, the refusal to allow compensation for the water power *could rest upon no other ground than that the claimant did not own the water power.* That is what the Court decided and all it did decide.

That question, which was discussed at such length in the *Chandler-Dunbar* case, is not involved in our case at all.

A decision that that particular riparian owner on St. Mary's River in the State of Michigan did not own the water power is of no significance here. The construction of the deeds and patents under which claimant asserted title involved, among other considerations, the statute and common law of Michigan, the fact that the property was originally a part of the public lands of the Federal government, the effect of the reservation as to this and other rivers contained in the Northwest Ordinances (*Economy Power and Light Co. v. United States,* 256 U. S. at pages 118–19), the fact that this is an international boundary stream bringing into play the treaty-making power and giving international import to any dealings with the stream (*Sanitary District v. United States,* 266 U. S. at pages 423 and 425–6).

There are in the opinion in the *Chandler-Dunbar* case some very broad statments which, however, are to be taken only with reference to the issues then before the Court. Whether they are *dicta* or not, they are not authorities on the extent of respondents' interests in this water power located in New York.

This question is not one of Federal power, but of compensation.

Whether the power of the Federal government is "plenary" or "paramount," it is subject to the Fifth Amendment. What are the property rights of the riparian owner, is a matter of local law to be determined under the rules of real property existing in the state where the property is located.

In the instant case it is stipulated that the respondents do own the water power and the dam.

But even aside from this, the property rights of riparian owners on the rivers in the State of New York are measured by their patents and deeds which must be construed by the law in force at the time of their execution and delivery. *Appelby v. City of New York,* 271 U. S. at page 381.

The rules for the construction of these instruments of title are rules of real property and the extent of the property rights acquired under such instruments must be determined under the laws of the state where the property is situated.

Shivley v. Bowlby, 152 U. S. 1
St. Anthony Falls Power Co. v. St. Paul Water Comm., 168 U. S. 349
Port of Seattle v. Oregon & W. R. R., 255 U. S. 56
U. S. v. Cress, 243 U. S. 316 at 319
Kansas v. Colorado, 206 U. S. at page 93

> "We are of opinion that *the property rights of the plaintiffs in error, as riparian owners, are to be measured by the rules and decisions of the state courts of Minnesota.* This principle, we think, has been announced and adhered to by this court from its very early days."
>
> *St. Anthony Falls Co. v. St. Paul Water Comm.,* 168 U. S. 349, at 358.

Justice Gray in his review of the rules of riparian ownership existing in the various states (*Shivley v. Bowlby,* 152 U. S. 1) shows that there is no uniformity even in the original thirteen states.

Outside of those states, the Federal government was the proprietor of the public lands and a uniform rule as to the riparian rights acquired under *Federal* grants may perhaps be established. (*Brewer Oil Co. v. United States,* 260 U. S. at page 87.) Such

grants are affected by Federal statutes in force at the time of their execution and delivery (*Shivley v. Bowlby,* 152 U. S. at pages 32–3) such as the Northwest Ordinance. (*Economy Power & Light Co. v. United States,* 256 U. S. at pages 118–19). But these considerations are of no significance in New York.

(d) Miscellaneous cases cited by petitioner.

Mississippi levee cases.

In support of its claim that we could not recover from the Federal government for the taking of our water power, petitioner (brief, page 27) cites three cases which do not involve water power at all, but arise out of the construction of levees in connection with flood control measures on the Mississippi river, to wit, *Jackson v. United States,* 230 U. S. 1; *Hughes v. United States,* 230 U. S. 24; and *Cubbins v. Mississippi River Commission,* 241 U. S. 351. These cases are decided under special rules appearing in both the Roman and the English law relating to flood waters (241 U. S. at pages 363–4). These are local rules applied to peculiar physical conditions and, even as to flood waters, they seem not to have been applied elsewhere. *Hopkins v. Clemson College,* 221 U. S. 636.

Bedford v. United States, 192 U. S. 217, is another levee case, the Court holding that the claimant could not complain of the action of the government in constructing a revetment to prevent the river from leaving its existing channel.

Bridge cases.

Petitioner cites a number of bridge cases in which it was held that Congress or a duly authorized official might require alterations in bridges over navigable rivers which interfered with navigation and which, therefore, constituted public nuisances. In this class are *Louisville Bridge Co. v. United States,* 242 U. S. 409; *Union Bridge Company v. United States,* 204 U. S. 364;

Hannibal Bridge Company v. United States, 221 U. S. 194; *Monongahela Bridge Co. v. United States,* 216 U. S. 177.

In effect these cases do not involve riparian rights at all, but concern the erection of structures in the river for the purpose of crossing the same. They hold that Congress has the power to require that such structures be altered so as not to interfere with the public easement.

Upon the same principles rest the following cases—*West Chicago R. R. v. Chicago,* 201 U. S. 506, where Congress and the City of Chicago required that a tunnel be lowered so as not to obstruct navigation—*Greenleaf Lumber Co. v. Garrison,* 237 U. S. 251, where a pier in a Virginia harbor interfered with a navigation improvement being made under Congressional appropriation—*United States v. Rio Grande Dam & Irrigation Co.,* 174 U. S. 690, wherein it was held that the United States might properly sue for an injunction to restrain an irrigation company from diverting the waters of the Rio Grande river to such an extent that the use thereof for navigation was interfered with.

Right of access cases.

While a riparian owner has a certain qualified right of access to navigable waters, including the right to construct wharves and piers, that right, being itself in the nature of a navigation right, must accommodate itself to the public right.

In *Scranton v. Wheeler,* 179 U. S. 141, the navigation of boats from plaintiff's land to the main channel of St. Mary's river was obstructed by the erection of a pier in the river by the United States government in connection with St. Mary's canal.

In *Gibson v. United States,* 166 U. S. 269, the same situation was presented on the Ohio river except that the structure placed in the river was a dyke.

In *Transportation Co. v. Chicago,* 99 U. S. 635, the City of Chicago was constructing a tunnel under the Chicago river and

the plaintiff claimed that it had suffered temporary injury during the course of construction (1) by obstructions in the street impeding access to its building, and (2) by a coffer-dam in the river which, for a time, prevented boats from reaching its wharves.

Cases of this class are not comparable with water power cases and the *Cress* case so holds (243 U. S. at page 327).

Other cases.

The limited significance of the case of *Bellinger v. New York Central R. R. Co.*, 23 N. Y. 42 cited by the petitioner is explained in the opinion of the Court of Appeals in *Burt Olney Canning Co. v. State*, 230 N. Y. 351.

In *Chase-Hibbard M. Co. v. Elmira*, 207 N. Y. 460, the city simply restored the waters of the river to their old channel from which they had been diverted. As the Court said (page 466), there was no "taking nor directly invading the plaintiffs' premises."

In *Waterloo Woolen M. Co. v. Shannahan*, 128 N. Y. 345, an injunction was sought restraining the performance of certain canal work on the ground that the act authorizing it was unconstitutional. The Court held the act to be constitutional and declared that if the plaintiff suffered any damage by reason of the prosecution of the work, it had the right to recover such damage in the Court of Claims.

Atwater v. Trustees of Canandaigua, 124 N. Y. 602, was decided on the theory that the act resulted in no permanent flooding (page 610), whereas in our case there is a permanent taking of a portion of our water power by the petitioner.

Green Bay Co. v. Patten Paper Co., 172 U. S. 58, presented a complicated situation arising in Wisconsin out of Federal land grants and various Federal and State statutes concerning such grants and the public lands covered thereby. The issue was as

to the respective proprietary interests of the State and the Federal government in the water power.

In *Lewis Blue Point Oyster Co. v. Briggs,* 229 U. S. 82 suit was attempted to be brought for the disturbance of an oyster bed under tide water in Great South Bay, Long Island, against a contractor engaged in dredging a channel under contract with the United States Government.

POINT VII

The judgment should be affirmed.

All of which is respectfully submitted.

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